No. 05-35264

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT



RANCHERS CATTLEMAN ACTION LEGAL FUND
UNITED STOCKGROWERS OF AMERICA,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Animal and Plant Health Inspection Service, *et al.*,
Defendants-Appellants.



On Appeal from the United States District Court
for the District of Montana

OPPOSITION OF *AMICUS CURIAE* TYSON FOODS, INC. TO PLAINTIFF-APPELLEE RCALF'S MOTION TO STRIKE

*Amicus curiae* Tyson Foods, Inc. ("Tyson") respectfully submits this opposition to the motion to strike its *amicus* brief filed by plaintiff-appellee Ranchers Cattlemen Action Legal Fund ("RCALF"). RCALF has moved this Court to strike Tyson's *amicus* brief principally on the ground that Tyson's brief is entirely duplicative of the arguments presented by defendant-appellant United

States Department of Agriculture ("USDA").[1] Tyson, which is the only entity filing an *amicus* brief that is regulated in its own right by USDA, has a direct stake in the outcome of these proceedings. Tyson maintains that its brief would contribute to this Court's consideration of the legal issues presented in the USDA appeal in a manner that enhances rather than parrots the arguments of USDA. RCALF has not accurately characterized the arguments presented in Tyson's brief. This opposition will set forth, in brief, certain distinctive features of Tyson's *amicus* brief.

*First*, Tyson pointed out that the final rule under consideration was issued by the Animal and Plant Health Inspection Service ("APHIS") under a statute that the district court failed accurately to cite, construe or apply. Tyson Br. at 11-13. The district court appears to have ruled under the mistaken impression that APHIS is solely responsible for ensuring the "health and welfare of the people of the United States." Order at 8. Tyson's brief cites and argues from the actual statutory authority, 7 U.S.C. § 8303(a)(1), which provides that APHIS's direct mandate is to protect *animal* health (and, thus, human health indirectly). As Tyson

[1] RCALF's motion to strike Tyson's *amicus* brief was filed within its omnibus opposition to the various motions of other *amici* to file *amicus curiae* briefs with this Court. This Opposition will therefore refer to that motion as the "RCALF Opp." RCALF does not distinguish between the reasons to strike Tyson's brief and the reasons to deny other *amici*'s motions to file. RCALF asserts an apparent "misunderstanding" with respect to whether RCALF consented to Tyson's filing its *amicus* brief. RCALF Opp. at 2 n. 1. RCALF does not move to strike Tyson's

noted, understanding the proper regulatory context is critical for a court to evaluate agency action. Here, the background, ignored by the district court, includes APHIS's role as but one agency among several working together to respond to the BSE threat. Tyson Br. at 11-13. Further, Tyson noted that the final rule is also part of a process of a robust *international* cooperative effort between food and animal safety officials in Canada and the United States. Tyson Br. at 14.

RCALF's motion to strike, when summarizing Tyson's arguments, omitted any reference to Tyson's presentation of the statutory and regulatory context for the final rule. RCALF Opp. at 7-8. Because RCALF ignored this aspect of Tyson's presentation, it apparently did not consider whether this particular argument merely duplicates USDA's argument. In fact, as a review of USDA's brief will reveal, it does not. USDA provides some examples of other agency actions related to BSE, but it does not note the district court's mischaracterization of the relevant statutory authorization for the final APHIS rule in question, and it does not argue that the high level of intra- and inter-agency cooperation merits special respect from the courts. USDA Br. at 23-24.

*Second*, USDA argued that the final rule is entitled to the "utmost deference" from the courts. USDA Br. at 20-22. While Tyson agrees with USDA that the district court failed to give the agency the deference it was due, Tyson also

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brief on the ground that RCALF had not consented.

took the view that a careful, probing review of the administrative record by courts is essential to proper review under the Administrative Procedure Act. Tyson's view, not expressed by USDA, is that searching review of the administrative record will help bring to light the strong scientific basis supporting the final rule. Tyson Br. 9-10.

*Third*, RCALF claims that Tyson's brief merely mimics USDA's view regarding the district court's error in treating the issuance an emergency rule as a longstanding policy. RCALF Opp. at 8. But, in fact, USDA's and Tyson's views, though complementary, are different in important respects.

Both briefs argue that the Supreme Court's presumption in favor of existing rules, as expressed in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), is inapplicable. But USDA emphasizes that APHIS undertook the kind of careful and reasoned analysis required by *State Farm*. USDA Br. at 30-31. USDA does not develop the argument that its emergency rule was adopted before a full investigation could be undertaken, and that its final rule was adopted after such an investigation had been completed. USDA Br. at 31.

Tyson, on the other hand, expands substantially on the implications of improperly applying a *State Farm* presumption in favor of an interim rule adopted on an emergency basis. Tyson, unlike USDA, explains the context in which emergency rules are often adopted. And Tyson, again unlike USDA, argues that it

would be poor administrative law to treat an emergency rule as "settled policy" precisely because it could potentially deter an administrative agency from taking prudent, quick, precautionary action for fear of courts locking the agency into a decision that was based on less than full information. Tyson Br. at 25-28.

## CONCLUSION

For the foregoing reasons, *amicus curiae* Tyson Foods, Inc. respectfully requests that this Court deny RCALF's motion to strike its *amicus* brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2005 I caused one copy of the foregoing Opposition of *Amicus Curiae* Tyson Foods, Inc. to Plaintiff-Appellee RCALF Motion to Strike to be served by Federal Express overnight delivery on the following:

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I also hereby certify that on May 6, 2005 I filed an original and 4 copies of the foregoing Opposition of *Amicus Curiae* Tyson Foods, Inc. to Plaintiff-Appellee RCALF's Motion to Strike by causing them to be sent by Federal Express overnight delivery to:

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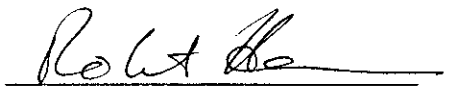

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